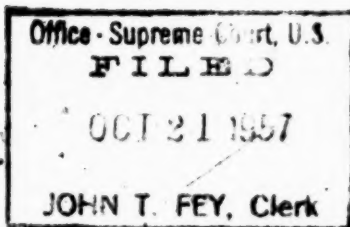


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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

NO. 23

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

JOINT BRIEF OF
RAILROAD COMMISSION OF TEXAS,
ATTORNEY GENERAL OF TEXAS, AND
TEXAS INDEPENDENT MOTOR CARRIERS,

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352 U. S. 187, 190; *Mayo v. United States*, 319 U. S. 441. It cannot "lay hold of [Government servants] in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient." *Johnson v. Maryland*, 254 U. S. 51, 57; *Miller v. Arkansas*, *supra*, at 190. No matter how valid the state policy involved may be, "the federal function must be left free [from such direct state exactions]", since "[t]his freedom is inherent in sovereignty." *Mayo v. United States*, *supra*, at 447.¹⁰

In this aspect of the case, also, the appellant's reliance on *Penn Dairies v. Milk Control Commission*, 318 U. S. 261, 270, is wholly misplaced. The state law there involved, fixing the minimum price for sales of milk, was held to be merely an "exercise of control over the seller" from whom the Government purchased, with only an incidental economic burden passed on to the Government. Here, however, even assuming that Section 530 is administered in the manner claimed by appellant, there would be a substantial interference with the military transportation system in California: Carload shipments, which

¹⁰ As the lower court found (R. 249-250), California's regulation would jeopardize security in still another way. In order to establish commodity rates for Government shipments, the contemplated volume of shipments as to the particular item would have to be disclosed to the Commission (and to other state regulatory agencies which might assume jurisdiction over rates for Government shipments—see note 8, p. 22, *supra*) (R. 385-6, 490). But the furnishing of such information to the several state regulatory commissions might well reveal a pattern of military movement from which enemy agents could derive vital information (R. 249-250, 385-386, 451-452).

would have gone forward in a simplified and expeditious manner, would have to be broken down and rearranged into several less-than-carload movements. There would be delays, added military personnel would be needed, and the shipping officers would find themselves in situations where they could not intelligently discharge the duties assigned them or could do so only, upon the condition that a certificate be executed and transmitted to the Commission. It is well settled, under the authorities cited at the outset of this discussion, that a state cannot thus hamper the federal function.

The Constitution reflects the determination that the procurement of supplies and services for the Army is a matter of national concern, to be regulated by the representatives of all the people and not to be controlled or interfered with by single states in their local interests; it vests the power "To raise and support Armies" in Congress and not in the states (U. S. Const., Art. I, Sec. 8, cl. 12). It is no answer to say that California may exercise its retained police powers over carriers operating within its jurisdiction. Where the exercise of that police power, regardless of its immediate incidence, results in "an interference with government, or an impairment of the efficiency of its agencies in any substantial way", it is inapplicable to the United States. *James v. Dravo Contracting Co.*, 302 U. S. 134, 157; see, also *Arizona v. California*, 283 U. S. 423, 451. Here, California in

⁴ While we believe no consideration can be given in these circumstances to the state's objective, it should be pointed out that exclusion of the Government's shipments from state regu-

its attempt to regulate the rates charged for Government shipments, has gone beyond the field of local affairs and has, in practical effect, engaged in regulation of the United States and of the support of its Armed Forces.

lation would not mean that abuses in federal transportation methods will go uncorrected. Army regulations implementing Department of Defense Directive 4500.9, January 6, 1956, App., *infra*, p. 74, require responsible officials, in the procurement of commercial transportation, to "be guided by and pursue policies which will not contravene the National Transportation Policy (enacted by Congress in the Transportation Act of 1940 and set forth in the preamble to the Interstate Commerce Act). * * *" (A. R. 55-8, par. 2, App., *infra*, p. 67. That policy seeks to " * * * foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without * * * unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof: * * *—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. * * *" A. R. 55-105, par. 4 (a) (1), App., *infra*, p. 66, specifically places the duty on transportation officers to insure that property is forwarded "by the least costly mode, having in mind * * * the national transportation policy * * *." As Mr. Justice Holmes stated in *Johnson v. Maryland*, *supra*, at 57, "that duty it must be presumed has been [and will be] performed." See also A. F. M. 75-1, par. 30104 (b), (c) (1), App., *infra*, p. 71.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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DECEMBER 1957.

APPENDIX

FEDERAL STATUTORY PROVISIONS

1. The pertinent Armed Services procurement provisions, 10 U. S. C. 2301 (70A Stat. 127-133), are as follows:

§ 2304. Purchases and contracts: formal advertising; exceptions

(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—

* * * *

(2) the public exigency will not permit the delay incident to advertising;

* * * *

(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;

* * * *

(12) the purchase or contract is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components;

* * * *

§ 2305. Formal advertisements for bids; time; opening; award; rejection

* * * *

(b). * * * Awards shall be made with reasonable promptness by giving written notice to that responsible bidder whose bid conforms to the

invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

* * * * *

2. The provisions authorizing the Defense heads to prescribe regulations are as follows:

10 U. S. C. 3012 (g):

The Secretary [of the Army] may prescribe regulations to carry out his functions, powers, and duties under this title.

10 U. S. C. 6011:

United States Navy Regulations shall be issued by the Secretary of the Navy with the approval of the President.

10 U. S. C. 8012 (f):

The Secretary [of the Air Force] may prescribe regulations to carry out his functions, powers, and duties under this title.

3. The Johnson Act, 62 Stat. 932 (28 U. S. C. 1342) provides:

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

4. Section 22 of the Interstate Commerce Act, as amended, 71 Stat. 564, 49 U. S. C. 22, provides in part:

(1) Nothing in this part shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States * * *.

(2) All quotations or tenders of rates, fares or charges under paragraph (1) of this section for the transportation, storage, or handling of property or the transportation of persons free or at reduced rates for the United States Government, or any agency or department thereof, including quotations or tenders for retroactive application whether negotiated or renegotiated after the services have been performed, shall be in writing or confirmed in writing and a copy or copies thereof shall be submitted to the Commission by the carrier or carriers offering such tenders or quotations in the manner specified by the Commission and only upon the submittal of such a quotation or tender made pursuant to an agreement approved by the Commission under section 5a of this Act shall the provisions of paragraph (9) of said section 5a apply, but said provisions shall continue to apply as to any agreement so approved by the Commission under which any such quotation or tender (a) was made prior to the effective date of this paragraph or (b) is hereafter made and for security reasons, as hereinafter provided, is not submitted to the Commission: *Provided*, That nothing in this paragraph shall affect any liability or cause of action which may have accrued prior to the date on which this paragraph takes effect. Submittal of such quotations or tenders to the Commission shall be made concurrently with submittal to the United States Government, or any agency or department thereof, for whose account the quotations or tenders are offered or for whom the proposed services are to be rendered. Such quotations or tenders shall

be preserved by the Commission for public inspection. The provisions of this paragraph requiring submissions to the Commission shall not apply to any quotation or tender which, as indicated by the United States Government, or any agency or department thereof, to any carrier or carriers, involves information the disclosure of which would endanger the national security.

5. Section 321 (a) of the Transportation Act of 1940, 54 Stat. 954, as amended, 59 Stat. 607, 49 U. S. C. 65, provides, in part:

(a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf. * * * *Provided further*, That section 3709, Revised Statutes (U. S. C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

FEDERAL REGULATIONS

1. The pertinent provisions of the Armed Service Procurement Regulations, 32 C. F. R. 1.108, *et seq.* (1957) are as follows:

§ 1.306-7 *Scheduling of deliveries to permit consolidation of shipments.* The accumulation of small shipments into carload or truckload lots will result in lower transportation costs. Also, the accumulation of small shipments into less than load shipments may also result in lower transportation costs. * * *

§ 1.306-9 *Rates.* Generally, carriers are required by both Federal and State laws to charge all shippers equally for like services rendered. However, when Government traffic possesses more favorable transportation characteristics (greater volume, heavier loading, less likelihood of damage, etc.) than commercial traffic between the same origins and destinations, freight rates are often lower for the Government traffic. Rate information shall be obtained from the appropriate military traffic management office.

§ 1.306-10 *Volume shipments.* Procurement involving volume shipments (as defined in Departmental instructions) shall be referred at the earliest practicable time to the appropriate military traffic management office for a determination of the reasonableness of applicable current rates and, when appropriate, for negotiation of adjusted or modified rates.

2. The pertinent Army Regulations are as follows:

(a) A. R. 55-105. *Transportation by Commercial Means; General.*

* * * * *

4. ROUTING, GENERAL—*a. General.*

(1) A transportation officer furnishing transportation will familiarize himself with traffic conditions out of his installation in order that property and passengers may be forwarded by the least costly mode, having in mind safety, expedition, equipment supply, procurement regulations, military necessity, and the national transportation policy (enacted in the Transportation Act of 1940 and set forth in the preamble to the Interstate Commerce Act), and subject to special instructions or required approvals by the Chief of Transportation. * * *

(b) A. R. 55-142. *Routing of Domestic Freight Traffic.*

* * * * *

2. GENERAL POLICIES. a. The least costly means of transportation will be selected which will meet military requirements and still be consistent with governing procurement regulations and transportation policies as expressed by Congress, contingent upon carrier ability to provide safe, adequate, and efficient transportation. However, if a prior factual determination has been made that expedited delivery will result in greater overall economies through a reduction of intransit or stored supplies, a more costly means of transportation may be employed if necessary to effect the expedited delivery.

(c) A. R. 55-8. *General Transportation and Traffic Management Policies.*

* * * * *

2. ADHERENCE TO NATIONAL TRANSPORTATION POLICY. a. In the employment of Army transportation resources and in the procurement of commercial transportation, responsible officials in the Army Establishment will be guided by and pursue policies which will not contravene the National Transportation Policy (enacted by Congress in the Transportation Act of 1940 and set forth in the preamble to the Interstate Commerce Act) and the Declaration of Policy by Congress to the Civil Aeronautics Authority (as contained in Section II of the Civil Aeronautics Act of 1938). These policies are reproduced in the appendix and may be referred to by the general term "National Transportation Policy."

(d) A. R. 55-27. *Appearance Before Transportation Regulatory Bodies.*

1. PURPOSE AND SCOPE. a. These regulations implement uniform military policy regarding participation by representatives of the Depart-

ment of the Army in proceedings before transportation regulatory bodies and outline the procedure to be followed with respect to Army support of carrier applications for new or additional operating authorities. Provisions apply to proceedings involving transportation (except international air route applications) to, from, or between points in the United States or the District of Columbia.

b. The uniform military policy and the procedural principles governing actions in connection with expansion of operating authorities also apply within the Army Establishment to appearances before transportation regulatory bodies in connection with discontinuance or abandonment of operating authorities and discontinuance of transportation service by commercial carriers.

* * * * *

(c) A. R. 380-5. *Safeguarding Defense Information.*

* * * * *

6. BASIC SAFEGUARDS. Classified information must be safeguarded from compromise. This is accomplished primarily by the following:

* * * * *

b. Limiting access to those who "need-to-know."

* * * * *

40. NEED TO KNOW. a. No person is entitled to knowledge or possession of classified defense information solely by virtue of his rank, office, position, or security clearance. Such matter will be entrusted only to individuals whose official duties require knowledge or possession and who have been properly cleared. Responsibility for determining whether a person's official duties require that he have access to any item or classified defense information rests upon each individual who has possession, knowledge,

or command control of the information involved and not upon the prospective recipient. These principles are equally applicable if the prospective recipient is an organizational entity, including commands, other Federal agencies, or a foreign government.

* * * * *

(f) A. R. 380-55. *Safeguarding Defense Information in Movement of Persons and Things.*

* * * * *

5. GENERAL. a. The provisions of this section apply to the classification of movement information.

b. Movement information is normally unclassified and may only be assigned appropriate defense classifications under the provisions of sections II and III, AR 380-5, when unauthorized disclosure **COULD RESULT IN EXCEPTIONALLY GRAVE OR SERIOUS DAMAGE TO THE NATION OR COULD BE PREJUDICIAL TO THE DEFENSE INTERESTS OF THE NATION.**

c. Movement information including, but not limited to, any of the following elements will be classified **CONFIDENTIAL** or higher when the classification criteria of *b* above, require—

(1) Information within the scope of paragraphs 14, 28, and 29a, AR 380-5.

(2) Missions of individuals, groups, units, organizations.

(3) Locations of persons, places, or things.

(4) Actual or estimated dates or times of arrival or departure.

(5) Personnel strengths and identification of persons, groups, units, organizations, or things.

(6) Routings of persons or things.

* * * * *

(g) Army Procurement Procedure 30-204.5, Utility Service Contracts, March 12, 1957.

a. ARMY POWER PROCUREMENT OFFICER. The Chief of Engineers, acting for the Secretary of the Army, is the Department of the Army Power Procurement Officer. The Army Power Procurement Officer is responsible for the administration of the purchase and sale of utilities services, and for policies, engineering, rates and legal sufficiency in connection with all utilities services transactions and contracts relating thereto in which the Department of the Army has a monetary interest. * * *

3. The pertinent Navy regulations are as follows:

(a) Navy Shipping Guide, Part I, art. 1800
(d) (3) (20):

(d) DELEGATION OF CONTROL TO NAVY CENTRAL FREIGHT CONTROL OFFICES.—

* * * * *

(3) OTHER DUTIES.—Other duties of the Navy central freight control offices are to:

* * * * *

20. advise the Bureau of Supplies and Accounts regarding impending freight movements when applicable freight rates appear excessive and, in the opinion of the Navy central freight control office, may be negotiated for more equitable rates.

(b) Navy Shipping Guide, Part I, art. 1800
(e) (4) (3):

(c) DESIGNATION AND RESPONSIBILITY OF SHIPPING OFFICERS.—

* * * * *

(4) RESPONSIBILITIES.—Shipping officers are responsible for the following:

* * * * *

3. to exercise sound traffic management procedures and to forward all shipments at the most economical over-all cost to the Government consistent with delivery requirements; * * *

(c) Navy Shipping Guide, Part I, art. 1845 (2)
(a) (1):

2. SELECTION OF THE MEANS OF TRANSPORTATION.

(a) POLICY.—

(1) *General*.—The basic policy in selecting the means of transportation and the choice of method, that is, rail freight, rail express, water carriers, motor carriers, parcel post, air carriers, etc., is to employ that which will effect delivery of the material at final destination on or before the required time at the lowest over-all total cost to the Government. * * *

(d) Bureau of Yards and Docks Manual, Ch. 11, ¶11B1.05:

It is the policy of the Bureau of Yards and Docks to provide utility services at activities of the Shore Establishment under terms and conditions that will achieve optimum economy for the Government, and are consistent with requirements, efficiency of operation, adequacy and reliability of service, health, and sanitation.

4. The pertinent Air Force regulations, found in AFM 75-1, Part three, Transportation Policies and Selection of Mode of Transportation, are as follows:

(a) AFM 75-1, Ch. 1 (General), ¶30101 (b),
(c) (1):

§ 30101. GENERAL TRANSPORTATION AND TRAFFIC MANAGEMENT POLICIES.—

* * * * *

b. *General*. In the employment of its own transportation resources and in the procurement of commercial transportation, the Depart-

ment of the Air Force will be guided by and pursue policies which will not contravene the National Transportation Policy enacted by Congress in the Transportation Act of 1940 and the Declaration of Policy by Congress to the Civil Aeronautics Authority, as contained in Section 11 of the Civil Aeronautics Act of 1938. These policies are cited in Appendices H and I for the guidance of all in connection with any reference thereto in Department of the Air Force transportation and traffic management procedures.

c. Policies:

(1) The economic resources of the Department of the Air Force inherent in its large procurement of commercial transportation will not be employed in such a manner as will adversely affect the economic well-being of the commercial transportation industry.

* * * *

(b) AFM 75-1, Ch. 1, §30102:

§ 30102. SELECTION OF MODE OF TRANSPORTATION.—

Selecting the mode of transportation to be used in shipping property and routing within the mode selected is a phase of traffic management which must be considered frequently in daily operations. In determining the mode of transportation to be utilized, the following factors will be considered:

a. The least costly means will be selected, having in mind safety, expedition, equipment supply, procurement regulations and security considerations.

b. Consideration will be given to the possibility of rate negotiations (tariffs, schedules, or Section 22 agreements). Before this can be done it is necessary to have certain information available.

(1) What is to be shipped and how it should be described on the bill of lading.

(2) Consignee and destination.

(3) Overall cost of shipping via different modes.

(4) Types of service afforded by various modes of transportation.

(5) Need for expedited service; routes specified in tariffs; clearances; and the type of service afforded by specific carriers within a mode.

(6) Security classification.

(c) AFM 75-1, Ch. 1, '30107:

30107. TRANSPORTATION AND INCIDENTAL COSTS—

In selecting the means of transportation and the choice of method, that is, rail freight, rail express, water carrier, motor carrier, parcel post, air carrier, etc., it is basic policy to employ that which will effect delivery at final destination on or before the required time at the lowest overall total cost to the Government. * * *

(d) AFM 75-1, Ch. 2 (Consolidating Shipments at the Military Installation), '30201:

30201. General. * * * To obtain lower transportation costs or more expeditious service, small-lot shipments may be held for as many as five workdays (or longer if advantageous) for consolidation with other shipments to the same destination; when there is a reasonable expectancy of accumulating truckload, carload, or other volume lots. * * *

(e) AFM 75-1, Ch. 5 (Negotiations with Commercial Carriers * * *), '80501

(b):

80501. General

* * * * *

b. *Basis for Negotiating Adjustments to Rates, Charges or Governing Rules.* Negotiations for adjustments or modifications of commercial carriers' rates, charges or governing rules will be undertaken only after a determination has been made as to the unreasonableness, unjustness or otherwise apparent unlawfulness of effective rates, charges or rules. Substantive and relative data will be prepared and offered in justification thereof. Negotiations will not be conducted by attempting to play one carrier or mode of transportation against the other. In instances where carriers have the option of providing rates in some manner other than by the usual tariff publication, no attempt will be made to prescribe which of the authorized methods will be used.

* * * * *

5. The pertinent Department of Defense Directives are:

Department of Defense Directive No. 4500.9, January 6, 1956:

* * * * *

SUBJECT General Transportation and Traffic Management Policies

* * * * *

II. GENERAL

In the employment of its own transportation resources and in the procurement of commercial transportation, the Department of Defense will be guided by and pursue policies which will not contravene the National Transportation Policy enacted by Congress in the Transportation Act of 1940 and the Declaration of Policy by Congress to the Civil Aeronautics Authority, as contained in Section II of the Civil Aeronautics Act of 1938. These policies are cited in the attached enclosure for the guidance of all in connection with any reference thereto

in Department of Defense transportation and traffic management policies.

III. POLICIES

- A. The economic resources of the Department of Defense inherent in its large procurement of commercial transportation will not be employed in such a manner as will adversely affect the economic well-being of the commercial transportation industry.

* * * * *

Department of Defense Instruction No. 4520.3, February 2, 1956:

SUBJECT Transportation Freight Rate Negotiation and Litigation (Domestic)

* * * * *

II. POLICIES

A. *Bases for Negotiating Adjustments to Rates, Charges or Governing Rules.*

Negotiations for adjustments or modifications of commercial carriers' rates, charges or governing rules will be undertaken only after a determination has been made as to the unreasonableness, unjustness or *otherwise apparent* unlawfulness of effective rates, charges or rules. Substantive and relative data will be prepared and offered in justification thereof. Negotiations will not be conducted by attempting to play one carrier or mode of transportation against the other. In instances where carriers have the option of providing rates in some manner other than by the usual tariff publication, the military departments will not prescribe which of the authorized methods will be used.

* * * * *

CALIFORNIA STATUTORY PROVISIONS

1. Section 526 of the California Code of Civil Procedure provides in part:

* * * * *

An injunction cannot be granted:

* * * * *

4. To prevent the execution of a public statute by officers of the law for the public benefit;

* * * * *

2. Section 1759 of the California Public Utilities Code, California Statutes 1951; ch. 714, § 1759, provides:

§ 1759. Jurisdiction of courts to review orders or decisions of commission. No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

3. Section 2107 of the California Utilities Code, provides:

§ 2107. Penalty for offenses not otherwise provided. Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$500) nor more than two thousand dollars (\$2,000) for each offense.

ARMY REGULATION 57-5

Motor Transport Service

* * * * *

4. Basic policies.—The following basic policies are set forth to guide commanders in their responsibilities for furnishing economical and efficient official motor transportation service in support of Department of the Army activities in the continental United States.

* * * * *

1. Except in cases of military necessity, such as emergencies, maneuvers, training activities, or operations requiring a high degree of security, or as otherwise authorized by specific Department of the Army directives, general transport administrative vehicles will not be employed when adequate and economical commercial transportation facilities are available.

* * * * *